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No. 00-536

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES H. HOLBROOK,
Petitioner,

versus

LOBDELL-EMERY MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Seventh Circuit Sitting as the Law Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should an employer, under the theory of respondeat superior, be held accountable for the conduct of its supervisors, where the supervisors, by outrageous conduct, intentionally caused severe emotional distress to a mentally ill employee?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, James H. Holbrook and the respondent, Lobdell-Emery Manufacturing Company.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Seventh Circuit, Sitting As The Law Court, entered in the above-entitled proceeding on July 6, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit has been reported and is reprinted in the appendix hereto, pp. 10a-15a, *infra*.

The opinion of the United States District Court, Southern District of Indiana, New Albany Division has not been reported and is reprinted in the appendix hereto, pp. 1a-9a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals, Seventh Circuit was entered on July 6, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part as follows: "The judicial power shall extend to all cases, in law and equity, . . . between citizens of different states; . . ."

STATEMENT OF THE CASE

A. Statement of Facts

The petitioner, James H. Holbrook ("Holbrook"), went to work for the respondent, Lobdell-Emery Manufacturing Company ("Lobdell-Emery") at its Indiana plant sometime in 1990. Holbrook lived across the Ohio River in Kentucky. Due to severe depression and psychosis, he was hospitalized in 1993. Upon his return to work, supervisors and coworkers, knowing of his hospitalization and illness, called him names, such as "crazy," "queer," and stated to him he was "not right in the head" and commented about his being in the "nut house." They bid his tools, glued his tool box and set fire to a rag in his back pocket This behavior continued until January 29, 1997, when Holbrook was terminated for fighting. Although Holbrook had reported these incidents over the years to his supervisors and their superiors, no action was take by any of them to stop the harassment. Shortly thereafter Holbrook was hospitalized.

B. Proceedings Below

Holbrook brought a tort action against Lobdell-Emery for intentional infliction of emotional distress, which required the showing of outrageous conduct intentionally inflicted causing severe emotional distress. The district court found the incidents to be "unthoughtful and boorish," "unkind, cruel and disheartening," "not at all uncommon in today's workplace," . . . "but clearly not outrageous." The District Judge also rejected the theory of "respondeat superior" holding Lobdell-Emery was not liable for the acts of its supervisors in conformity with Indiana law and granted summary judgment for the respondent.

The Court of Appeals, although writing "It is not difficult to imagine that a jury would exclaim 'Outrageous!' upon hearing that Holbrook's co-workers taunted him and set him on fire knowing he had recently been released from a hospital where he was being treated for severe depression and psychosis", would not extend the wrongdoing to the employer and permit the case to go to a jury. The District Court's granting of summary judgment was affirmed.

REASONS FOR GRANTING THE WRIT

I. State And Federal Courts Are Clearly Divided On The Application Of The Theory Of Respondeat Superior In The Workplace

The concept of a federal general common law was rejected in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). This case directed that federal courts sitting in diversity cases apply the substantive law of the forum State. In this case, Indiana law rejects the theory of respondeat superior for the tortious behavior by supervisors and co-workers. However in recent years, there have been a series of federal cases which have not rejected the theory. *Spark* v. *Pilot Freight Carries, Inc.,* 830 F.2d 1554 (11th Cir. 1987) broad-

ened the scope of an employer's liability as a result of the conduct of supervisors. *Sparks,* 830 F.2d at 1558-59.

A broadened general agency theory was adopted in *Spencer* v. *General Electric Co.,* 894 F.2d 65 1 (4th Cir. 1990) which broadly defined "employer" to include any "agent" of the employer in the spirit of Title VII cases. *Spencer,* 894 F.2d at 657.

It was held in *Highlander* v. *KFC Nat'l Management Co.,* 805 F.2d 644 (6th Cir. 1986) that an employer is strictly liable for the conduct of its supervisory employees. This was a sexual harassment case. Here the Court reasoned that because "Title VII defines 'employer' to include 'a person engaged in industry affecting commerce and any agent of such person,' knowledge of an employment decision based on impermissible sexual factors is imputed to the employer." *Highlander,* 805 F.2d at 649.

II. THERE IS A COMPELLING NATIONAL INTEREST FOR THE PROTECTION OF THE MENTALLY ILL IN THE WORKPLACE

The supervisors and co-workers of Holbrook, with knowledge of Holbrook's mental illness, harassed, humiliated and disgraced him daily to the extent that there was a constructive policy of the employer for this conduct. Employers have been held accountable in harassment and discrimination cases. The health, safety and welfare of the work force in the United States, especially those workers who are disabled, have had the protection of this Court since the early years of the twentieth century. To extend the theory of respondeat superior to the employer in this case would keep the trust of those who have written on this issue while a member of this Court.

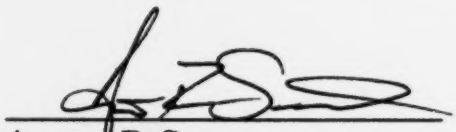
To protect the mentally ill against conduct outrageous and atrocious in character, which goes beyond all possibly bounds of decency and is totally unacceptable in a civilized

community, is a matter so compelling in the national interest as to demand the application recent rulings cited herein as a resolution of evolving issues in the law relating to the theory of respondeat superior.

CONCLUSION

The theory of respondeat superior should be broadened to apply in cases where outrageous conduct has occurred by the intentional infliction of emotional distress. Holbrook's mental illness is the basis for the conduct stipulated herein to meet the standard of being outrageous. I urge the Court grant the petition in this case and remand this case to the District Court for a jury trial.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Cause No. NA-98-0016-C-D/G

JAMES HALL HOLBROOK, - - - - *Plaintiff,*

v.

LOBDELL-EMERY MANUFACTURING COMPANY, - - - - - - - - *Defendant.*

SUMMARY JUDGMENT—Dated May 19, 1999

ENTRY

This cause comes before the Court on Defendant's motion for summary judgment. For the following reasons, Defendant's motion is GRANTED.

I. BACKGROUND

Plaintiff James Hall Holbrook ("Holbrook") began working for Defendant Lobdell-Emery Manufacturing Co. ("Lobdell-Emery") in 1990 at its manufacturing plant in Corydon, Indiana. Apparently

Holbrook's working conditions took a turn for the worse in 1993. Holbrook was hospitalized for depression and psychosis from April 22 through April 29, 1993. Although discharged from the hospital, Holbrook continued to receive treatment for his mental conditions for an additional six weeks. After returning to work, Holbrook states that several co-employees and supervisors began harassing him due to his recent hospitalization. Specifically, Holbrook asserts that:

1) in approximately 1993 supervisors Tim Shewmaker and Scott Sturgeon made unfavorable comments to Holbrook concerning the quality and speed of his work;

2) on one occasion in 1993 supervisor Sturgeon made an explicit sexual remark to Holbrook concerning a female safety director;

3) on several occasions in 1993, after returning from medical leave, two co-workers commented to Holbrook that he was "crazy," "not right in the head," and commented about his hospitalization in the "nut house" and "mental ward";

4) in approximately 1994 supervisor Wilkerson made unfavorable comments to Holbrook concerning the quality and speed of his work;

5) on several occasions from 1994-1996, Superintendent Jim Fye called Holbrook names such as "homo," "mother fucker," "fag," and "queer";

6) on several occasions from 1995-1997, certain of Holbrook's co-workers played practical jokes on him such as lighting a rag on fire in his back pocket, hiding his tools, and "spot gluing" his toolbox;

7) during Holbrook's employment, Lobdell-Emery once refused to allow him to work overtime; and

8) during Holbrook's employment, Lobdell-Emery once denied his bid to move to a new job position.

Holbrook reported this conduct to his superiors; however, Lobdell-Emery did not take any action to stop this harassment.

Holbrook's situation at Lobdell-Emery reached its boiling point on January 29, 1997. Holbrook came to blows with another Lobdell-Emery employee after Holbrook had written something about that co-employee and a cat. After conducting an investigation into the incident, Lobdell-Emery terminated Holbrook on January 30, 1997 for violating the company's rule against fighting.

Unhappy with his treatment by Lobdell-Emery, Holbrook filed a grievance with his union on February 4, 1997. However, the union found that Holbrook's discharge was appropriate and did not pursue the grievance.

Left with no other recourse within Lobdell-Emery or his union, Holbrook filed this action on January 26, 1998. The Complaint alleges that: (1) Lobdell-Emery's decision to terminate his employment violated his civil rights; (2) Lobdell-Emery discriminated against him because of his emotional and mental illness, a disability which was known to Lobdell-Emery; and (3) Lobdell-Emery committed such outrageous acts as to constitute intentional infliction of emotional distress. Lobdell-Emery filed the current motion for summary judgment on January 8, 1999.

II. ANALYSIS

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 211 (1986); Lindemann v. Mobil Oil Corp., 141 F.3d 290, 294 (7th Cir. 1998). The moving party initially bears the burden of proving the absence of any genuine issues of material fact, and that it is entitled to judgment as a matter of law. Celotex Corn. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 274 (1986); Lindemann, 141 F.3d at 294.

Once the moving party has met its burden, the non-moving party must come forward and show a genuine issue for trial. Celotex Corp., 477 U.S. at 322-23, 91 L. Ed. 2d at 273; Lindemann, 141 F.3d at 294. The non-moving party may not merely rest on its own allegations, The Pantry, Inc. v. Stop-N-Go Foods. Inc., 777 F. Supp. 713, 726 (S.D. Ind. 1991) *(quoting* Anderson, 447 U.S. at 248, 91 L. Ed. 2d at 212), as a genuine issue of material fact exists only where the non-moving party produces sufficient evidence for a jury to return a verdict in the nonmoving party's favor. Gray v. American Family Mut. Ins. Co., 825 F. Supp. 203, 206 (S.D. Ind. 1993) *(citing* Wolf v. Fitchburg, 870 F.2d 1327, 1329 (7th Cir. 1989)).

A. Constitutional Claims

Holbrook does not mention his civil rights claim nor his discrimination due to disability claim in his response brief. Instead, Holbrook argues "[t]he case is founded on the treatment of James [Holbrook] at work by his co-workers and supervisors and his known mental illness." Plaintiff's Response Brief at 5. Lobdell-Emery correctly points out that Holbrook's failure to address these claims is tantamount to abandonment. *See* Jones v. Watson, 106 F.3d 774, 776 n.1 (7th Cir. 1997); Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 n.2 (7th Cir. 1996). As such, the Court dismisses these claims.

B. Intentional Infliction of Emotional Distress

Before we can address the tort of intentional infliction of emotional distress, we must first determine whether Holbrook's claim is preempted by the Indiana Worker's Compensation Act ("Act"). If it is, the Court must dismiss this action for lack of subject matter jurisdiction.

The Act provides the exclusive remedy for any employee suffering personal injury or death by accident arising out of and in the course of employment. Ind. Code §§ 22-3-2-2 & 6. In an effort to clarify the relationship between the Act and torts such as intentional infliction of emotional distress, the Indiana Supreme Court granted transfer to three cases: Baker v. Westinghouse Elec. Corp, 637 N.E.2d 1271 (Ind. 1994); Foshee v. Shoney's, Inc., 637 N.E.2d 1277 (Ind. 1994); and Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994). In Baker, the Court held that the Act did not include an employer's intentional torts. Baker, 637 N.E.2d at 1273. However, the Court limited the intentional tort exclusion in Foshee and held that an intentional tort fell outside the scope of the Act only if it was committed by the employer or the employer's alter ego and the employer either intended the injury or actually knew that injury was certain to occur. Foshee, 637 N.E.2d at 1281. Finally, in Perry the Court recognized that an employee could pursue a claim against an employer outside of

the Act if the claim sought recovery only for emotional, and not physical, injuries. Perry, 637 N.E.2d at 1289.

Following the Indiana Supreme Court's precedent, courts have held that a claim of intentional infliction of emotional distress predicated on incidents arising in a work environment is not covered by the Act if the plaintiff does not seek recovery for physical injuries. See McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159 (7th Cir. 1997); Tacket v. General Motors Corp., 93 F.3d 332 (7th Cir. 1996); Parker v. Noble Roman's, Inc., No. IP96-0065-C-D/F, 1996 WL 453572 (S.D. Ind., June 26, 1996); Coble v. Joseph Motors, Inc., 695 N.E.2d 129 (Ind. Ct. App. 1998); Landis v. Landis, 664 N.E.2d 754 (Ind. Ct. App. 1996).

Here, Holbrook seeks recompense for Lobdell-Emery's intent to harm him emotionally. See Pltf's Resp. Br. at 9. Holbrook does make one vague reference to physical injury in his response brief;[1] however, it appears that Holbrook has trimmed down his intentional infliction of emotional distress claim to seek recovery solely for the mental anguish he has allegedly suffered at the hands of Lobdell-Emery. As Holbrook currently seeks recovery only for emotional — and not physical — injuries, his claim is not preempted by the Act. We turn now to address the merits of Holbrook's claim.

The Indiana Supreme Court first recognized intentional infliction of emotional distress as a viable cause of action in Cullison v. Medley, 570 N.E.2d 27 (Ind. 1991). The Court explained: "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." Id. at 31 (citing Restatement (Second) of Torts, §

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[1] Holbrook states "Intentional conduct causing mental anguish does not require accompanying physical injury, although in this case there was physical injury." Pltf's Resp. Br. at 6.

46 (1965)). The basis of this tort is the intent to harm one emotionally. Id.

This standard proves too high for Holbrook, as he has failed to show that Lobdell-Emery intended to cause Holbrook emotional distress or that the acts alleged qualify as extreme or outrageous. Consequently, his claim fails as a matter of law.

Holbrook has filed suit not against his individual tormentors, but his employer Lobdell-Emery. This raises the question whether the Indiana Supreme Court's pronouncement in Foshee, which requires the plaintiff to show that the employer committed the tort and either intended the injury or actually knew the injury would occur, is solely a jurisdictional requirement or is also an element of the tort. Unfortunately for Holbrook, Cable v. Joseph Motors, Inc., 695 N.E.2d 129 (Ind. Ct. App. 1998) held that applies to both the preemption analysis and the intent element.

In Coble, a former employee brought an intentional infliction of emotional distress claim against her employer based on the actions of a manager. Addressing whether the Act preempted the employee's claim, the court noted that the plaintiff's claim sought relief for emotional and not physical injuries. As such, the court reasoned that under Perry the plaintiff's claim was not preempted by the Act and was properly before the trial court. Id. at 133. However, the Indiana Court of Appeals then found that the plaintiff could not meet the burden of showing that the employer corporation or the corporation's alter ego intended her emotional injury. Id. at 134. Consequently, the court found that the plaintiff's injury did not fail within the "intentional injury exception to the exclusivity of the Compensation Act" and found that summary judgment in favor of the employer was proper. Id. at 5-6.

The Court acknowledges that the Coble decision almost appears circular — plaintiff's claim wasn't preempted by the Act because she sought recovery for only emotional injuries (as per Perry) but that her claim failed because she could not prove that the employer corporation inten-

tionally caused the injury (as per Foshee). However, if we view the Coble court's use of Foshee as an element to establishing employer liability for the tort of intentional infliction of emotional distress and not as another jurisdictional requirement, the Coble decision becomes much more logical. Further, this reading accurately reflects the Seventh Circuit's observation that "Indiana courts have been reluctant to award damages for intentional infliction of emotional distress in employment cases." McCreary, 132 F.3d at 1167. As such, the Court finds that Holbrook must show that Lobdell-Emery, or its alter ego, committed the tort and intended the injury or actually knew that the injury was certain to occur.

This Holbrook cannot do. Holbrook has offered no evidence revealing that Lobdell-Emery as a corporation committed the infliction of emotional distress. The tact that some of the alleged harassers were managers and supervisors means little, as Lobdell-Emery is liable only when "the individual who committed the tortious act was acting pursuant to a policy or decision made through the corporation's regular decision-making channels by those with authority to do so." Perry, 637 N.E.2d at 1287. Holbrook does assert that the actions of his tormentors constitute Lobdell-Emery policy. However, this mere assertion, unsupported by any evidence, is insufficient to overcome summary judgment. Holbrook provides no evidence indicating that Lobdell-Emery was aware of his plight, that Lobdell-Emery intended to injure him, or that any of the alleged harassers set policy at Lobdell-Emery or were carrying out stated policy. In short, Holbrook has failed to provide any evidence whatsoever that Lobdell-Emery as a corporation had the requisite intent to support a claim for intentional infliction of emotional distress. See Coble, 695 N.E.2d at 134-35. As such, Holbrook's claim fails as a matter of law and summary judgement is appropriate.

In the alternative, even if Holbrook had shown that Lobdell-Emery manifested the required intent, the incidents complained of are neither extreme nor outrageous.

Very little conduct falls under the tort of intentional infliction of emotional distress; consequently, only "where conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" will courts find liability. Gable v. Curtis, 673 N.E.2d 805, 810 (Ind. Ct. App. 1996) (citing Restatement (Second) of Torts, § 46, Comment d (1965)). No liability attaches to "mere insults, indignities, threats, "annoyances, petty oppressions, or other trivialities . . . ." Id.

Certainly none of the episodes described by Holbrook can be classified as outrageous, extreme, atrocious or utterly intolerable. Instead, they represent unthoughtful and boorish behavior which is, unfortunately, not all that uncommon in today's workplace. Such incidents are unkind, cruel and disheartening, but clearly are not the extreme or outrageous acts that the tort of intentional infliction of emotional distress was created to remedy. Further, the broad time-span of these alleged acts undercuts much of the impact such comments would create. Therefore, the Court finds as a matter of law that the alleged incidents, even when taken as true, do not constitute extreme or outrageous conduct. As such, Holbrook cannot prove all the elements of the tort and summary judgment is appropriate.

III. CONCLUSION

Although Holbrook's Complaint charges Lobdell-Emery with violating his civil rights under the United States Constitution and the Indiana Constitution as well as discriminating against him because of a disability, Holbrook has failed to address either claim in his response brief. As such, the Court deems these claims abandoned, and they are dismissed.

The Court finds that Holbrook's remaining claim intentional infliction of emotional distress is not preempted by the Indiana Worker's Compensation Act. However,

Holbrook's claim fails as a matter of law for failure to show either Lobdell-Emery's intent to harm Holbrook or that the complained of conduct was extreme or outrageous. Consequently, summary judgment is appropriate.

Dated this 19th day of May, 1999.

/s/ Hugh Dillin
Hugh Dillin
United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 99-2565

JAMES H. HOLBROOK, - - *Plaintiff-Appellant,*

v.

LOBDELL-EMERY MANUFACTURING COMPANY, - - - - - - *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. 98 C 16—S. Hugh Dillin, Judge.

OPINION—Argued April 4, 2000—
Decided July 6, 2000

Before COFFEY, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

ROVNER, *Circuit Judge.* James H. Holbrook sued his employer, Lobdell-Emery Manufacturing Company, for intentional infliction of emotional distress ("IIED"), violations of his civil rights under the United States and Indiana Constitutions, and disability discrimination. The district court granted summary judgment in favor of Lobdell-Emery on the IIED claim and dismissed Holbrook's other claims because he abandoned them. Holbrook appeals only the summary judgment ruling on the IIED claim. Because Holbrook cannot show that his employer intended to harm him, a requirement under Indiana law, we affirm.

I.

The district court granted summary judgment in favor of Lobdell-Emery and therefore we must construe the facts as favorably to Holbrook as the record will permit. *See*

Rager v. Dade Behring, Inc., 210 F.3d 776, 777 (7th Cir. 2000). Holbrook began working for Lobdell-Emery in 1990 at its Indiana plant. In 1993, he was hospitalized for depression and psychosis. When he returned to work, his co-workers and supervisors began to harass him about his hospitalization. Three supervisors criticized the quality and speed of his work, and one made a sexual remark to him about a female co-worker. A superintendent called Holbrook "homo," "mother fucker," "fag," and "queer." On a number of occasions, co-workers told Holbrook he was "crazy" and "not right in the head." They referred to his hospitalization as time he spent in the "nut house" and the "mental ward." Holbrook's co-workers also harassed him by hiding his tools, spot gluing his toolbox, and setting fire to a rag in Holbrook's back pocket. The company itself refused to allow Holbrook to work overtime on one occasion, and also denied his bid to move to a new job position. After Holbrook was involved in a fist fight with another employee, Lobdell-Emery terminated him. Holbrook filed a grievance with his union, but the union declined to pursue it, finding that the discharge was appropriate.

Holbrook sued Lobdell-Emery for violations of his civil rights in terminating his employment, for discrimination against him based on his emotional and mental illness, and for intentional infliction of emotional distress. Lobdell-Emery moved for summary judgment. Holbrook did not address his civil rights claim or his disability discrimination claim in responding to the motion, and the district court dismissed those claims as abandoned. The district court found that the remaining IIED claim was not preempted by the Indiana Workers' Compensation Act because Holbrook sought recovery only for emotional and not physical injuries, and because his injuries did not arise from an accident. The district court granted summary judgment in favor of Lobdell-Emery, however, because Holbrook could not show that the employer itself committed the tort and that the employer intended the injury or actually knew the injury would occur, showings required by Indiana law. Al-

ternatively, the district court granted summary judgment because the acts alleged by Holbrook were not extreme or outrageous enough to come within the purview of the IIED tort. Although the district court agreed these acts were "unthoughtful and boorish," as well as "unkind, cruel and disheartening," it found these were not the sort of acts the tort was created to remedy. Holbrook appeals.

II.

On appeal, Holbrook challenges only the district court's finding that the acts alleged were not so outrageous in character that they meet the standard for IIED. He contends that because these supervisors and co-workers knew Holbrook was mentally ill, and indeed tormented him *because* he was mentally ill, he has raised a question of material fact for the jury as to whether the acts alleged go beyond all possible bounds of decency, as required by Indiana case law. According to Holbrook, only a jury may decide whether the acts alleged meet the standard of extreme and outrageous conduct. Holbrook does not address at all the district court's primary holding that he has no evidence supporting a finding that Lobdell-Emery itself or its alter ego committed these acts and intended the harm that came to Holbrook.

The Indiana supreme court first recognized the tort of intentional infliction of emotional distress in 1991, adopting the Restatement (Second) of Torts view: "The definition of the tort of intentional infliction of emotional distress is that 'one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such distress.'"

Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991) (quoting Restatement (Second) of Torts, § 46). In 1994, the court took up the issue of whether the Workers' Compensation Act ("WCA") preempted intentional tort claims against employers by employees. Because the WCA covered injuries that occurred "by accident," the court held that intentional torts, those that occurred when neither the injured party

nor the employer intended the result, are not within the WCA's coverage, and thus are not preempted by the WCA. *Baker v. Westinghouse Electric Corp.*, 637 N.E.2d 1271, 1274 (Ind. 1994).

In order to prove that the employer intended the harm, the court held that a showing of mere negligence was insufficient, even if the negligence could be characterized as reckless or wanton. *Baker*, 637 N.E.2d at 1275. Rather, the employee is required to prove that the employer deliberately intended to inflict an injury or had actual knowledge that an injury is certain to occur. *Id.* The court also emphasized that it is the employer itself that must have intended the injury, rejecting a *respondeat superior* analysis. Thus, an intentional tort committed by a supervisor, manager or foreman could subject that individual to tort liability but would not necessarily expose the employer to liability. *Baker*, 637 N.E.2d at 1275. In order to impute tortious intent to an employer that is a legal entity or artificial person, the employee must show either that "(1) the corporation is the tortfeasor's alter ego, or (2) the corporation has substituted its will for that of the individual who committed the tortious acts." *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1287 (Ind. 1994). The court held that to prevail under the alter ego theory, the employee must show that both ownership and control of the corporation are in the tortfeasor's hands. *Id.* To succeed under the other theory, the employee must show that the individual who committed the tort was acting pursuant to a policy or decision made through the corporation's regular decision-making channels by those with authority to do so. *Id.* The employee's injury must be shown to be the intended product of the policy or decision at issue if the plaintiff is to prevail. *Id. See also Foshee v. Shoney's Inc.*, 637 N.E.2d 1277, 1281 (Ind. 1994) (before an injury can be said to have been intended by the employer and thus not by accident, the employee must show that the tort was committed by the employer or the employer's alter ego, and the employer must have intended the injury or actually known that the injury was certain to occur).

Holbrook cannot meet these stringent standards. He does not argue that the supervisors and co-workers who harassed him owned or controlled the corporation. He does not assert that the persons who injured him were acting pursuant to a decision or policy made through Lobdell-Emery's regular decision-making channels by persons authorized to do so. He merely contends that Lobdell-Emery knew of the situation and did nothing to stop it. The case law we have cited reveals a much higher standard for liability than mere negligence, however, and Holbrook's claim against his employer therefore fails under Indiana law. Holbrook attributes only a few actions to the corporation itself, namely refusing to allow him to work overtime on one occasion and denying his bid to move to a new position on another occasion. Even if these acts were committed by the employer with the intent to cause Holbrook emotional injury, these acts do not meet the standard for extreme and outrageous conduct set forth by comments to § 46 of the Restatement. Those comments, cited favorably by the Indiana Court of Appeals, define extreme and outrageous conduct as that which is so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *See Gable v. Curtis,* 673 N.E.2d 805, 809-10 (Ind. Ct. App. 1996) (citing the Restatement (Second) of Torts § 46, comment d). It is not enough that the defendant acted with intent that is tortious, or malicious, or even criminal. "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.* The refusal of overtime and the denial of a position change clearly do not meet the standard.

We render no opinion, however, on whether the other acts committed by Holbrook's co-workers and supervisors meet the standard for extreme and outrageous conduct. Had Holbrook sued the individuals who actually committed these acts, rather than his employer, the result may

have been different. It is not difficult to imagine that a jury would exclaim "Outrageous!" upon hearing that Holbrook's co-workers taunted him and set him on fire knowing that he had recently been released from a hospital where he was being treated for severe depression and psychosis. We join the district court's assessment that verbally and physically assaulting a mentally disabled man is cruel and inexcusable. Because he sued his employer rather than his co-workers, however, the district court was correct to grant summary judgment in favor of Lobdell-Emery under Indiana law.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit